

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SZFLW v MINISTER FOR IMMIGRATION &
BORDER PROTECTION & ANOR*

[2015] FCCA 2603

Catchwords:

MIGRATION – Refugee Review Tribunal.

PRACTICE & PROCEDURE – Show cause hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) – no arguable case for the relief claimed – application dismissed.

Legislation:

Migration Act 1958 (Cth) ss.5, 36, 91W, 91WA

Federal Circuit Court Rules 2001 (Cth) rr.44.12, 44.13

Cases Cited:

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437

Minister for Immigration and Ethnic Affairs v Guo & Anor (1997) 191 CLR 559

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407

Applicant: SZFLW

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1483 of 2015

Judgment of: Judge Emmett

Hearing date: 22 September 2015

Date of Last Submission: 22 September 2015

Delivered at: Sydney

Delivered on: 22 September 2015

REPRESENTATION

The applicant appeared in person with the assistance of a Mandarin interpreter.

Solicitor for the Respondents: Mr Liam Dennis (Sparke Helmore)

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1483 of 2015

SZFLW

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. On 1 June 2015, the applicant filed an application seeking judicial review of a decision of the Refugee Review Tribunal dated 8 May 2015 and handed down on 11 May 2015 (“**the RRT**”).
2. On 6 July 2015, the applicant attended a directions hearing before me. I explained to the applicant that this Court has no power to interfere with

the decision of the RRT, unless the Court is satisfied that the RRT's decision is affected by a mistake going to the jurisdiction of the RRT. I further explained to the applicant that, under the Rules of this Court, where the application does not disclose an arguable case for the relief sought, the application may be dismissed forthwith.

3. At the directions hearing, the applicant was provided with a copy of the applicable costs schedule of the Court and I explained to the applicant the consequences that would flow to him if a costs order was made against him. Namely, that whilst any costs order remained unpaid, it would become a debt to the Commonwealth of Australia. As such, the applicant's ability to obtain any other type of visa or re-enter Australia may be significantly affected.
4. The applicant confirmed that he wished to continue with the application for judicial review. The applicant was given leave to file and serve an amended application giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit, as well as submissions in support.
5. At the directions hearing, the applicant was provided with the contact details of legal services providers and interpreting and translation services in documents headed in his own language.
6. At the request of the first respondent, the matter was listed for today for a hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) ("**the Rules**"), a copy of which was also given to the applicant.
7. Rule 44.12 of the Rules provides as follows:

"(1) At a hearing of an application for an order to show cause, the Court may:

(a) if it is not satisfied that the application has raised an arguable case for the relief claimed—dismiss the application; or

(b) if it is satisfied that the application has raised an arguable case for the relief claimed—adjourn the proceeding and order a respondent to show cause at a final hearing why an order for the relief claimed should not be

made on such of the grounds mentioned in the application as are specified by the Court; or

(c) without making an order under paragraph (b), make final orders in relation to the claims for relief and grounds mentioned in the application.

(2) To avoid doubt, a dismissal under paragraph (1)(a) is interlocutory.”

8. Relevantly, r.44.13 provides:

“(1) At a hearing of an application for an order to show cause, the applicant is confined to the relief sought and the grounds mentioned in the application.”

9. The first respondent, in written submissions, accurately summarised the background of the applicant’s claims and the RRT’s decision, as follows:

“1. The applicant, a citizen of China, first arrived in Australia on 18 August 2004 as the holder of a Tourist (Class TR) visa. On 25 August 2004, the applicant applied for a protection (Class XA) visa. On 23 November 2004, a delegate of the Minister refused to grant the protection visa. The applicant did not seek merits review of that decision. However, on 12 January 2005, the applicant sought judicial review of the delegate’s decision, which was dismissed on 2 March 2005 (CB 57). The applicant became an unlawful non-citizen and was taken into immigration detention on 26 September 2013.¹

2. On 30 September 2013, the applicant applied for a further protection visa (CB 1).² On 23 July 2014, a delegate of the Minister refused to grant that protection visa (CB 54). On 5 August 2014, the applicant applied to the Tribunal for review of the delegate’s decision (CB 70). On 8 May 2015, after a hearing on 5 May 2015 (CB 83), the Tribunal affirmed the decision under review (CB 92).

Applicant’s claims

3. The applicant claimed to fear harm in China because he was a practitioner of Falun Gong. The applicant claimed he had been detained and tortured and feared harm in the future at the

¹ See sections 189 and 196 of the *Migration Act 1958* (Cth) (‘the Act’).

² The relevant effect of *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 was that section 48A of the Act did not prevent an applicant making a further protection visa application for assessment under the criterion in section 36(2)(aa).

hands the authorities and society. He also fears he will be suspected of harbouring Falun Gong practitioners. The applicant claimed that in 2012, the police had come to his house and asked his wife where he was.

Tribunal decision

4. *The Tribunal found that the applicant was not a “truthful witness” and that he had “fabricated a set of claims” (both in his original and subsequent protection visa applications) for the purpose of obtaining permanent residence in Australia (CB 95: [15]).*

5. *The Tribunal identified that the applicant entered Australia using a passport with the identity [applicant’s first identity]. The applicant maintained that identity until the Tribunal hearing where he provided a passport in the name of [applicant’s second identity] claiming that was his true identity (CB 93, 96: [3], [18]). The Tribunal noted that before the delegate, the applicant maintained he was [applicant’s first identity]. However, before the Tribunal he claimed he was [applicant’s second identity] (CB 95-96: [16]-[17], [18]).*

6. *The applicant’s explanations for the discrepancy were that he would not have been able to leave the country on his true passport and he “dared” not reveal his true identity lest he be reported for practising Falun Gong (CB 96 [19]). The Tribunal found that the applicant had not “satisfactorily explained” why he “dare” not tell the Department his true identity; nor why he had made two applications for protection under the false name (CB 96-97: [20]).*

7. *The Tribunal also identified inconsistencies in the applicant’s claims about his experiences as a Falun Gong practitioner and past harm (CB 97: [21]-[22]). The Tribunal did not accept the applicant’s explanation that he was the victim of an “unscrupulous migration agent” who “fabricated claims” for him (CB 98: [24]).*

8. *The Tribunal found that the applicant’s brief account of his claims in his protection visa application did not support his claims for protection (CB 98: [25]). The Tribunal considered that if those claims were true, the applicant would have made “considerable efforts” to provide more detail (CB 98: [25]).*

9. *In relation to the applicant’s “practise and knowledge” of Falun Gong, the Tribunal found that the applicant was unable to*

demonstrate “anything other than a limited understanding” of Falun Gong (CB 99-100: [26], [30]). Further, given his claimed experience, the Tribunal found his knowledge to be “superficial” with “no real interest or commitment” (CB 99: [27]).

10 . The Tribunal also noted that the applicant did not provide any evidence of practising Falun Gong in Australia. In any event, the Tribunal found that any limited involvement would have been for the purpose of “fabricating evidence” (CB 100: [29]).

11. For these reasons, the Tribunal rejected all of the applicant’s claims and found that he did not satisfy the complementary protection criterion under section 36(2)(aa) of the Act (CB 100-101: [30]-[31]).

12 . The Tribunal also found that section 91WA of the Act was engaged. Relevantly, that section provides that the Minister must refuse to grant a protection visa if the applicant provides a “bogus document” (as defined in section 5(1) of the Act) as evidence of the applicant’s identity and the Minister is not satisfied the applicant has provided a “reasonable explanation” for providing that document (CB 101: [32]).”

(References capable of identifying applicant redacted.)

10. The applicant was unrepresented before the Court this morning, although had the assistance of a Mandarin interpreter.
11. The applicant confirmed that he had not filed any further documents, either in accordance with my directions or otherwise.
12. At today’s hearing, the applicant had photographs that he sought to tender that had not been provided to the RRT. The applicant claimed that these photographs would prove that he was a Falun Gong practitioner.
13. I explained to the applicant that it was not the role of this Court to reconsider his claims and that the only issue before this Court was whether or not the decision of the RRT had been made according to law. I further explained to the applicant that it could not be a mistake on the part of the RRT for it to have failed to consider material that he did not provide to the RRT. The tender of the photographs was objected

to by the solicitor for the first respondent on the grounds of relevance and rejected by me on that basis.

14. The applicant confirmed that he relied on the grounds of his initiating application for judicial review, filed on 1 June 2015, as follows:

“1. The Tribunal arrives a decision without supporting evidence.

Particulars:

a) At paragraph 24 of the Tribunal decision, “the Tribunal considers that this was instead because the applicant was aware that he was providing a fabricated set of claims based on his purported involvement with Falun Gong. The Tribunal considers that his was because he had no interest in the application or the outcome of the application, and it was lodged as a means of remaining in Australia”.

b) At paragraph 25 of the Tribunal decision, “as being unlawfully in Australia for a period of some nine years, he sought to further delay his residence in Australia and deliberately provided a brief set of claims in an attempt to avoid later inconsistencies during oral interviewing. The Tribunal considers that this is further indicative of the fact that the applicant is an untruthful and unreliable witness who is willing to fabricate and alter his evidence when he considers it convenient to do so.”

2. The Tribunal failed in applying the section 91W on my case.

Particulars:

In respect of using false passport, I (the applicant) did not refuse or failed to comply with the request. The Tribunal has used the wrong test without considering the s91W(2)(b).”

15. Each of the grounds was interpreted for the applicant and the applicant was invited to say whatever he wished in support of the grounds.

16. Ground 1(a)

17. In Ground 1(a), the applicant has identified a finding of the RRT with which he does not agree. In support of Ground 1(a), the applicant stated that his claims were not fabricated and that everybody knew that he was practising Falun Gong.

18. The part of the RRT's decision upon which the applicant relies is part of the reasons why the RRT made comprehensive adverse credibility findings in respect of the applicant, and appears at paragraph 24 of the RRT's decision record, as follows:

"24. The Tribunal has considered the applicant's claims in relation to the inconsistencies between the first and the second applications for protection. The Tribunal considers it likely that the applicant had limited knowledge of the contents of his first Protection visa application. The Tribunal does not accept that this was because he was the victim of an unscrupulous migration agent who had fabricated his claims for him. The Tribunal considers that this was instead because the applicant was aware that he was providing a fabricated set of claims based on his purported involvement with Falun Gong. The Tribunal considers that this was because he had no interest in the application or the outcome of the application, and it was lodged as a means of remaining in Australia. The Tribunal considers that had the applicant any interest in the outcome of that application that he would have ensured he knew the contents of the application and to have ensured that it contained detailed and correct information in relation to his claims to have been a Falun Gong practitioner who had suffered harm in China. The Tribunal also considers that the applicant's evidence to the Tribunal that he paid the agent for "two applications" is indicative of the fact that he was aware that the application would be refused by the Department and it was his intention to appeal the decision to further delay his stay in Australia. The Tribunal does not accept that the applicant's considerable lack of involvement and his disinterest in the application is in any way indicative of someone who wished to establish that he had been harmed in China as a result of his commitment to Falun Gong."

19. In conducting its review, the RRT had regard to the procedural history of this matter where the applicant, a citizen of China, first arrived in Australia on 18 August 2004, on a tourist visa. On 25 August 2004, the applicant applied for a protection visa and on 23 November 2004, a delegate of the first respondent refused to grant the applicant a protection visa. On 12 January 2005, the applicant sought judicial review of the delegate's decision. That application was dismissed on 2 March 2005, whereupon the applicant became an unlawful non-citizen and was taken into immigration detention on 26 September 2013.

20. On 30 September 2013, the applicant applied for a further protection visa and on 23 July 2014, a delegate of the first respondent refused to grant the protection visa and the applicant then applied to the RRT for review of that decision. On 8 May 2015, after a hearing on 5 May 2015, the RRT affirmed the decision under review.
21. At the RRT hearing, the applicant claimed to fear harm in China because he was a Falun Gong practitioner. The applicant claimed that he had been detained and tortured in China and feared harm in the future at the hands of the Chinese authorities. The applicant also claimed to fear harm because the Chinese authorities suspected that he harboured Falun Gong practitioners. The applicant further claimed that police had come to his house in 2012 and asked where his wife was.
22. The RRT found the applicant not to be a truthful witness and that he had fabricated his claims for protection for the purposes of obtaining permanent residency in Australia. The RRT further found that the applicant had entered Australia on a false passport which he had maintained until the RRT hearing.
23. The RRT explored the applicant's claims with him at the hearing, including the reasons as to why he maintained a false identity and, in particular, why he had made two separate applications for protection visas under false names. However, ultimately, the RRT was not satisfied by the applicant's explanations.
24. The RRT identified inconsistencies in the applicant's claims about his experience as a Falun Gong practitioner in China and rejected the applicant's submission that he had been the victim of an unscrupulous migration agent who had fabricated claims for him.
25. The RRT found that the applicant's brief account of his claims in his protection visa application lacked detail and did not support his claims for protection. The RRT noted that it would have expected the applicant to have made further effort to provide more detail in relation to his claims for protection. The RRT found the applicant's knowledge of Falun Gong to be limited and superficial. This led the RRT to find that the applicant had no real interest or commitment to Falun Gong practice.

26. The RRT noted that the applicant had not provided any evidence of practising Falun Gong in Australia, and that any limited involvement that the applicant may have had with Falun Gong in Australia was only because he wished to fabricate evidence for the purpose of his protection visa application. The RRT did not accept that the applicant's limited involvement in Falun Gong practice in Australia would be known to the authorities in China or that was a real risk that it would result in him suffering significant harm upon his return to China.
27. The RRT found that the applicant had never been a genuine Falun Gong practitioner in China and found that he would not practice Falun Gong upon his return to China. The RRT did not accept any of the applicant's claims to have harboured other Falun Gong practitioners in his home in China or that he was a Falun Gong leader or detained by the Chinese authorities at any time. Further, the RRT did not accept that the Chinese authorities came to the applicant's home looking for his wife, or that the Chinese authorities had any adverse interest in the applicant for any reason.
28. Accordingly, having comprehensively rejected all of the applicant's claims, the RRT found that the applicant was not entitled to protection either under ss.36(2)(a) or 36(2)(aa) of the *Migration Act 1958* (Cth) ("**the Act**").
29. It is well established that the RRT is not obliged to accept uncritically any and all claims made by an applicant (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451 per Beaumont J; *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559 at 596 Kirby J; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70 per Wilcox J).
30. The RRT's findings would appear to be open to it on the evidence and material before it and for the reasons it gave, including its adverse credibility findings. Credibility findings are a matter par excellence for the RRT (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J).
31. Accordingly, Ground 1(a) is not made out.

32. Ground 1(b)

33. In Ground 1(b), the applicant provided a further particular in support of his assertion that the RRT arrived at a decision without any supporting evidence. The applicant's complaint in Ground 1(b) arises from paragraph 25 of the RRT's decision record, as follows:

“25. The Tribunal has found above that the applicant has not been truthful in relation to his identity and his reasons for maintaining a false identity for some 11 years. The Tribunal also does not accept that the applicant's actions in providing a brief account of his claims in the current application, does not support the applicant's claims that he is a genuine Falun Gong practitioner who was detained and tortured in China and who fears similar treatment upon his return to China. The Tribunal considers that had the applicant been detained and persecuted in China as a Falun Gong prior to his arrival in Australia in 2004, and later found that his application on that basis had been refused, that he would have, with the assistance of his immigration agent, made considerable efforts to provide a detailed account of his experiences and his claims for protection. As indicated above, the applicant instead provided a brief account of his experiences in China as a Falun Gong practitioner. The Tribunal considers that the applicant's actions are indicative of the fact that he manufactured a set of claims in his initial application made in 2004, and following his detention in 2013 by the Department as being unlawfully in Australia for a period of some nine years, he sought to further delay his residence in Australia and deliberately provided a brief set of claims in an attempt to avoid later inconsistencies during oral interviewing. The Tribunal considers that this is further indicative of the fact that the applicant is an untruthful and unreliable witness who is willing to fabricate and alter his evidence when he considers it convenient to do so.”

34. In support of Ground 1(b), the applicant said that he could not get out of China in his own name and he had to use a false name. The RRT did not accept that explanation. The RRT's finding that the applicant was untruthful and unreliable, and that he was willing to fabricate and alter his evidence as he considered it convenient to do so, was open to it on the evidence and material before it and for the reasons it gave.
35. In particular, the RRT noted that, had the applicant been detained and persecuted in China as a Falun Gong practitioner prior to his arrival in

Australia in 2004 and later found that his application for protection in Australia on that basis had been refused, he would have made considerable further effort to provide a detailed account of his experiences and claims in his second protection visa application.

36. Instead, the RRT found that the applicant provided only a brief account of his experiences in China. The RRT found the applicant's actions to be indicative of the falsehood of the applicant's claims made in respect of his first protection visa application. Further, the RRT found that the applicant's brief set of claims in support of the present protection visa application was made to further extend his residence in Australia.

37. Accordingly, Ground 1 does not raise an arguable claim for the relief sought.

38. Ground 2

39. In Ground 2, the applicant stated that the RRT failed to apply s.91W of the Act in his case and further stated that the RRT should have considered s.91W(2)(b) of the Act. Section 91W(2)(b) is as follows:

“Evidence of identity and bogus documents

(2) The Minister must refuse to grant the protection visa to the applicant if:

(b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request.”

40. The RRT did not refer to s.91W(2)(b) of the Act.

41. It is not clear to the Court what the applicant's complaint in relation to s.91W(2)(b) of the Act is intended to be. The applicant made no submission in support of that complaint. In the circumstances, I accept the submission of the first respondent that this ground was misconceived, in that the RRT considered and applied s.91WA of the Act and made no reference to s.91W(2)(b) of the Act.

42. Section 91W of the Act was interpreted for the applicant and he was invited to say whatever he wished in support of Ground 2. The applicant responded that the RRT's decision was unreasonable and that it was made in the absence of supporting evidence, and further, that he

had admitted that he had used a false passport and had given the RRT his real name.

43. Section 91WA of the Act is as follows:

“Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

44. The RRT’s findings in relation to s.91WA are at paragraph 32 of its decision record, as follows:

“Section 91WA

32. As discussed with the applicant during the hearing, provisions have recently been introduced into the Migration Act which provide that Protection visas must be refused or not granted for

the provision of bogus identity/citizenship or nationality documents unless the person has a reasonable explanation for providing the bogus document or destroying/disposing of the bogus document. This provision applies to all applications currently before the Tribunal. The Tribunal has not accepted the applicant's claims in relation to his reasons for providing a bogus document in the form of a passport in the name of [applicant's first identity], which was provided as evidence of his nationality when he made the first and second applications for Protection. The Tribunal does not accept that the applicant has provided a reasonable explanation for using a false passport and a false identity, being a bogus document, for some 11 years. The Tribunal finds that the applicant does not meet s.91WA of the Migration Act."

(References capable of identifying applicant redacted.)

45. It is clear from the RRT's statement above that the RRT found that the provision by the applicant of his false identity of citizenship and nationality, as reflected in the passport he provided in support of both his applications for protection in Australia, was a bogus document. A bogus document is defined in s.5(1) of the Act, as follows:

*"**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:*

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly."

46. Section 91WA of the Act was introduced into the Act by the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth).
47. The first respondent tendered the Explanatory Memorandum to the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth) ("**the Explanatory Memorandum**"), and that document was marked Exhibit 2R. In particular, at paragraph 57, the Explanatory Memorandum stated as follows:

“57. The purpose of this amendment is to ensure a protection visa applicant provides documentary evidence of their identity, nationality or citizenship wherever possible to do so and to discourage applicants from providing false identity documents, or destroying or discarding existing, genuine documents.”

48. Having found the applicant’s passport to be a bogus document, the RRT considered the applicant’s reasons for providing a bogus document, but did not find that they amounted to a reasonable explanation. In the circumstances, it was open to the RRT to conclude that the applicant did not meet s.91WA of the Act. That finding would appear to be open to the RRT on the evidence and material before it and for the reasons it gave.
49. I accept the first respondent’s oral submission that, where the RRT had not been satisfied that the applicant had a reasonable explanation for providing the bogus document, the RRT’s reasons for rejecting the applicant’s application were mandated by s.91WA of the Act.
50. In any event, the RRT’s rejection of the applicant’s review application based on s.91WA of the Act is independent of its adverse credibility findings in respect of the applicant’s claims for protection (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437).
51. While I make no final decision as to whether or not the RRT’s decision is affected by jurisdictional error, the applicant has not identified any error on the part of the RRT that is capable of establishing jurisdictional error and none is apparent on the face of the decision record. The RRT referred to the relevant law in affirming the decision under review.
52. In the circumstances, I am not satisfied that the application has raised an arguable case for the relief claimed.
53. Accordingly, in the exercise of the Court’s discretion under r.44.12(1) of the Rules and on the basis that the application does not raise an arguable case, the proceeding before this Court, commenced by way of application filed on 1 June 2015, should be dismissed pursuant to r.44.12(1)(a) of the Rules with costs.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 29 September 2015 (Amended Reasons for Judgment sent: 9 October 2015)